Articles

BEARING GOOD WITNESS: THE RELUCTANT EXPERTS

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In October 2006 the government launched a consultation document, *Bearing Good Witness: Proposals for reforming the delivery of medical expert evidence in family law cases*. The consultation closed in February 2007 and a summary of responses was published in July 2007. Prior to that, in a parliamentary statement on 17 June 2004, the Minister for Children, Young People and Families indicated that she had arranged for the Chief Medical Officer (CMO) to carry out an inquiry into how best to ensure the availability and quality of medical expert resources in court proceedings because there was an 'acute problem … in finding experts of high standing to give medical evidence in proceedings'. She did not explain why this situation had arisen nor did she address the more acute problem. The unavailability of expert witnesses in proceedings is a symptom of the widespread reluctance of paediatricians, in particular, but also other professional staff, to be involved in child protection work in any respect. That reluctance was and is having a serious detrimental effect on the current arrangements for the protection of vulnerable children generally and will ensure that the narrower area of interest, that of experts being appointed for a specific purpose, will become even more difficult for want of the availability of sufficiently experienced professionals. The executive summary of *Bearing Good Witness* sets out the factors that, in the opinion of the CMO, deter doctors from being expert witnesses:

- few training programmes;
- court processes intimidating and stressful;
- court processes slow, bureaucratic and time consuming; and
- fear of referral to the General Medical Council (GMC) by vexatious parties.

Of these, only the last is in reality having a significant impact and that problem is understated in the consultation document. That this is the major problem is reflected in the report of the summary of responses, where it is reported that of those involved in child protection, an oft-mentioned difficulty was in filling posts. Also, a substantial number of respondents focused on possible referral to the GMC as the most important deterrent to act, and commented that nothing in the CMO's report proposed ways of reducing this deterrent effect. The genuine and justified fears also relate to NHS Trust disciplinary processes, Ombudsman inquiries and the attitude and approach of those within the Commission for Health Care Regulatory Excellence. The deterrence arises not only from the possibility of complaint, but from the ease with which campaigning groups organise complaints and target individuals, and the willingness with which those responsible for the administration of the complaints processes engage with those campaigners and complainants. The very real perception is that the processes are unjustly applied and unfairly focus on, and discriminate against, those who give evidence from a child-centred approach, favouring instead adult interests, particularly those reflected in the activities by the campaigning groups. Few professionals would be willing to engage in areas of practice when they risk having their names, addresses, personal affairs and defamatory statements about them being published on websites set up for the purpose. The Royal College of Paediatrics and Child Health Report, *An*

investigation into the nature and impact of complaints made against paediatricians involved in child protection procedures (RCPCH, January 2007) confirms this to be the case and contains evidence of the strength of feeling among professionals about the management of complaints processes by those responsible. That strength of feeling has increased enormously since the outcome of the GMC hearing, which resulted in the eminent paediatrician Professor David Southall being struck off the register, was announced in December 2007.

In *Bearing Good Witness* the three cases of *Patel*, *R v Clark* [2003] EWCA Crim 1020, [2003] 2 FCR 447 and *R v Cannings* [2004] EWCA Crim 1, [2004] 1 WLR 2607 are identified as giving rise to 'growing public unease about miscarriages of justice arising from the quality and validity of evidence given by medical expert witnesses in the courts' (para 1.1). However, the outcome of those cases did not justify that concern. What gave rise to concern was the reaction of the media, encouraged by government, the disciplinary bodies and a determined campaign by groups intent on undermining the reputations of highly regarded professionals. It was the unjustified and uncorrected reaction to the cases that caused the crisis, not the decisions or judgments in the cases themselves. It follows that many of the processes put in place reflect that overreaction and have caused or contributed to the crisis that is adversely affecting the protection of vulnerable children across the country. The reaction of the Attorney General, Solicitor General and Minister for Children, Young People and Families following the *Cannings* judgment published in January 2004 was immediate and far-reaching. It only later became clear, due to Munby J's determination to explore the circumstances, the extent of political influences and the part played by the Solicitor General's sister (see *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142 where he describes this in detail.) However, the reaction of Ministers fuelled the media hype and created the impression of widespread injustice and incompetence within the family courts jurisdiction.

Circular LAC (2004) 5, announcing a review of children's cases by the Attorney General in the light of the *Cannings* judgment, was issued knowing that two cases were pending before the Court of Appeal (Civil Division) that would consider the impact of *Cannings* on family court cases. Mr Justice Munby's judgment in *Re B* exposed the actions of individuals within the Department for Education and Skills (DfES) who had endorsed court papers, which were then disclosed to Ministers and a large number of MPs in contempt of court, with the words: 'expedite verdict as will give a civil case judgment on which we can base review' (see *Re B* at [36]). That is, it would justify the review of civil court cases that it had already been decided to undertake. In the event, in the cases of *Re U (Serious Injury: Standard of Proof); Re B* [2004] EWCA Civ 567, [2004] 2 FLR 263 the President of the Family Division made clear the limited impact of the *Cannings* case. She commented that: 'There may have been a tendency in some quarters to over-estimate the impact of the judgment in *R v Cannings* in family proceedings' (at [24]) and: 'Given a similar background to that in *R v Cannings* a judge would be required to ask himself which of two possible explanations, human agency or unascertained natural cause, is the more probable' (at [22]). The remainder of the judgment made clear that *Cannings* had very little impact on the family court jurisdiction.

Had ministers waited for this judgment, the inappropriateness of the review of 30,000 public law child care cases would have been apparent. In the event the review failed to establish what the then political climate expected. However, it did inappropriately create the impression that there was widespread injustice caused by medical witnesses.

THREE CRUCIAL CASES

The three high profile cases of *Patel, Clark* and *Cannings* continued in the *Bearing Good Witness* consultation to be linked to the issue of injustice. Is this justifiable? Do they give cause for concern regarding the contribution of medical witnesses? In the *Cannings* judgment the Court of Appeal insisted that there were no issues of principle arising from the acquittal of Trupti Patel and commented that:

> 'on the evidence the jury was not sure of guilt. Lest anyone seek to read anything deeper into that observation, and imply that we are commenting one way or another on the verdict, we emphasise that is all that is ever decided by a "not guilty verdict". Nowadays, we read and hear much about a new concept, "found innocent": that is not a verdict known to the law' (*R v Cannings* [2004] EWCA Crim 1, [2004] 1 WLR 2607, at [15])

Mrs Clark's conviction was quashed because of the failings and hence credibility of Dr Williams, the pathologist in the cases involving the two dead children, which were sufficient to create a doubt. There could be no retrial as the bodies had been cremated and so were unavailable for further examination. He was not an expert instructed in the case in the sense used in the CMO report, but was a practising pathologist involved in the cases throughout. During the GMC fitness to practice hearing concerning Williams, Dr Armour, Home Office Pathologist, gave evidence that: 'By the time Dr Williams came to do [Harry Clark's autopsy] the evidence he was dealing with a double homicide was … overwhelming'. This had been the view of the Court of Appeal when considering and dismissing Mrs Clark's first appeal against conviction. Significantly, the court refused to accept that the evidence in relation to statistics by Professor Meadow justified quashing the conviction. In the second successful *Clark* appeal, the Court of Appeal in vain attempted to prevent any implication that there was reason to be concerned about other cases.

> 'We are aware that there is public speculation as to whether other convictions of mothers for killing their babies where the babies died sudden deaths, are similarly unsafe. The matters to which we have referred are directly referable only to this case' (*R v Clark* [2003] EWCA Crim 1020, [2003] 2 FCR 447, at [182])

Subsequently, the Court of Appeal in *Cannings* repeated this assertion 'the observations on the facts in the CACD in that [the *Clark*] case were case-specific, and not otherwise of general application to the present appeal' (at [16]). Mrs Cannings' conviction was quashed because:

> 'we are quite unable to reject the realistic possibility that in the absence of some compelling piece of evidence, whether specialist or extraneous, suggestive of deliberate infliction of harm, there may have been a genetic cause, as yet unidentified, for the deaths and ALTEs' (at [35]).

Other incidents within the extended family therefore created a doubt. This did not mean that medical opinions supporting the deliberate harming of the various children who died was necessarily wrong or to be criticised and the court did not do so. The Court of Appeal itself clearly became concerned at the unintended results of the judgment, including many cases, both civil and criminal, being discontinued, and the many appeals fuelled by the Attorney General's reaction to the judgment. Consequently, the court took the earliest opportunity, in *R v Kai-Whitewind* [2005] EWCA Crim 1092, [2006] Crim LR 348, to correct the inappropriate overreaction to it. The court described the manner in which *Cannings* had been interpreted as 'overblown' and effectively confined the decision to the peculiar and specific facts of *Cannings* itself.

Finally, the case of Donna Anthony, *R v Anthony* [2005] EWCA Crim 952, [2005] All ER (D) 85 (Apr), referred to in the *Bearing Good Witness* consultation, is a useful illustration of how the misunderstanding of the implications of *Cannings* has impacted. It is cited as a case involving injustice, but the fact is the Court of Appeal reluctantly quashed the conviction and remarked that, unlike the *Cannings* case, there was 'cogent and disturbing' evidence in addition to the disputed medical evidence (at [76]). The appeal was allowed on a 'narrow basis'. A retrial was narrowly rejected, despite much of the evidence still being available, because the case was old and the appellant's mother, who gave evidence on her behalf, had since died. The court concluded that it was 'not without some hesitation' they had decided not to order a retrial (at [98]). However, it was only the court of its own motion that

considered these issues, since the Crown had not contested the appeal nor invited a retrial, a clear indication of the impact of the atmosphere created around these issues, with responsibility being laid at the door of medical witnesses.

DISCIPLINARY PROCEEDINGS

In the view of medical staff in particular, the discriminatory nature of action against professionals has been clear and has demonstrated to them a disinterest in children's welfare within these processes. Dr Paterson is referred to in the consultation document, but his case provides a striking contrast to the treatment of Professors Southall and Meadow, as he had been giving evidence in a manner criticised by the High Court for over 15 years before action was taken to erase him from the medical register in 2004. Courts had criticised his practise severely, yet he carried on without altering his approach.

Some witnesses prominent for the defence in the high profile cases referred to above have been criticised in subsequent cases.

It is pertinent to look at examples of decisions taken by the GMC in cases not involving the protection of children. For example: a doctor failed to take action in the Shipman case, despite being alerted by other professionals and deliberately misleading the investigators. He was prohibited from practising for 12 months. Out of five doctors convicted for possessing child pornographic material, four were allowed to continue in practice and one case is still to be considered. Six hundred children were misdiagnosed by a doctor, who administered unnecessary powerful drugs such that some were now 'zombies'. The doctor was simply ordered to undergo retraining.

PROFESSORS SOUTHALL AND MEADOW

The above treatment of colleagues is inevitably compared to the treatment of the paediatricians Professors Southall and Meadow, who it has been accepted by the GMC also acted throughout in good faith. Stemming from the first hearing in front of the GMC, Professor Southall was prohibited from practising in child protection for 3 years by the GMC. He had acted neither as examining doctor nor court appointed expert. The sanction was imposed for reporting his concerns that Sally Clark may have been wrongly identified as the killer of her children, and suggesting, confidentially to the proper authorities, that it may instead have been Mr Clark; and for failing to interview the parents before forming a view. The Commission for Health Care Regulatory Excellence appealed to the High Court, seeking Professor Southall's erasure from the register. During the case, counsel for the Commission referred the judge to an extract from one of the huge number of testimonials sent in Professor Southall's support. The extract indicated that Professor Southall was a man who put the interests of children before his own and counsel astonishingly commented that that was 'the problem'.

Subsequently, Professor Southall was referred once again to the GMC, this time for alleged 'misconduct' arising many years earlier. The most important allegation made against him was that he had accused a grieving mother of murdering her son. In this case Professor Southall had been requested by the Family Court to interview the parents in order to try to rule out the possibility of parent-induced illness. He undertook this interview in the presence of an independent witness, a senior social worker, who took contemporaneous notes of the meeting. He also took notes of the meeting himself. Yet despite the fact that the social worker confirmed his evidence and testified to the GMC that he did not so accuse the mother, and despite the fact that this allegation had been previously investigated in 2001 by a team of independent child abuse experts, who had reported that the allegation was unfounded, the GMC chose to uphold the uncorroborated evidence of the mother and held against him.

The treatment of Professor Meadow has also, of course, had a significant impact on the willingness of paediatricians to expose themselves to similar risks. The GMC Fitness to Practice Panel (FPP) on 15 July 2005 made clear the extent and limit of their inquiry: 'This inquiry has been limited solely to your failures in your erroneous application of statistical data in your role as

an expert witness' and: 'If, as you have said repeatedly, you were not a statistician this should have been made clear to the court: instead, you spoke authoritatively outwith your own field of expertise'.

The Court of Appeal in the first *Clark* appeal considered and commented on Professor Meadow's use of statistics:

> 'No one would know better than Professor Meadow that this important evidence as to whether these deaths were unnatural lay in the physical finding post mortem, in the account of the last hours of the infants, and in the evidence and credibility of the parents – it certainly did not lie in statistics. And it is clear from reading his evidence that his conclusions were firmly based on that medical and circumstantial evidence, as we would expect' (*R v Clark* [2000] All ER (D) 1219, at [160])

The FPP found it unnecessary to consider the transcripts of the proceedings that had led to the complaint against Meadow and found serious professional misconduct. It ordered Meadow's name to be erased from the Medical Register. On appeal to the courts Collins J allowed the appeal against that finding, commenting: 'It is difficult to think that the giving of honest albeit mistaken evidence could save in an exceptional case properly lead to such a finding' and:

> 'I need say little about the sanction. It was unnecessary since the appellant had retired from clinical practice. It was imposed in the teeth of the many testimonials to him and the knowledge that he had made a real contribution to paediatric medicine.'

And:

> 'The FPP referred to the seriousness of his "undermining of public confidence in doctors who have this pivotal role in the Criminal Justice System". If the full facts are taken into account and the media campaign based on a lack of knowledge of all the circumstances is ignored that comment is unjustified. And to say, as the FPP did, that his conduct was "fundamentally incompatible with what is expected by the public from a registered medical practitioner" approaches the irrational.' (*Meadow v General Medical Council* [2006] EWHC 146 (Admin), [2006] 1 FLR 1161, at [56] and [57])

These comments, which it could be said amounted to an assertion of a vindictive approach by the GMC, influenced inappropriately by the media, echoed the view of the majority of paediatricians who had considered the case. They see no evidence, however, of any action against or criticism of the GMC for this improper approach or any suggestion that the practice and attitude will change, and no inquiry into the conduct of those responsible. The GMC appeal against Collins J's judgment gave the opportunity for the Court of Appeal to consider the GMC approach to the perceived misdemeanour (*Meadow v General Medical Council (Her Majesty's Attorney-General Intervening)* [2006] EWCA Civ 1390, [2007] 1 FLR 1398). For the first time in the process, the court identified what was self evident to those anxious about the processes, that others also had responsibility for the departure in his evidence from areas of his expertise, in particular the judge and counsel acting for the parties, who were well aware from his statement and evidence in chief what were the limitations of Meadow's expertise and yet asked and allowed questions to be asked on matters beyond that expertise.

The court has consequently given guidance on those issues, but no disciplinary action has been taken against any legal personnel and paediatricians have noted that no official comment has appeared from any interested body criticising the approach of the GMC throughout the process. While Professor Meadow endured these processes, the extensive media coverage suggested that all he had ever contributed to child protection was in doubt and in particular the approach to Fabricated and Induced Illness (FII), to which had made an enormous contribution, was flawed. No official comment making clear the narrow aspect of the GMC proceedings or correcting the impression given in respect of the wider issues was

made by the GMC or any other interested party. On the contrary, ministerial statements appeared to support the impression. (See for example the Parliamentary Statement of the Solicitor General on 24 March 2004 in which she wrongly identified the *Cannings* case as one in which FII had been alleged.) Furthermore, the Court of Appeal cases emphasising that beyond the issue of statistics there was no reason to be concerned about the evidence of Professor Meadow (see for example *R v Martin* (2005) EWCA Crim 2043. (unreported)) have received no publicity.

WHAT IS THE PROBLEM?

As was reported in the *Guardian* of 2 April 2007, more than 50 paediatricians launched an attack on the GMC, accusing it of deterring doctors from speaking out (see C Williams et al, 'Special Article – United Kingdom GMC fails Child Protection' (2007) 119(4) *Pediatrics* 800). Their view is that the problem for vulnerable children is not primarily the difficulty in securing expert witnesses in proceedings, it is the withdrawal of paediatricians from child protection work and the reluctance of paediatricians to express opinions or judgments in this area. This is primarily for fear of exposure to processes in which they have no confidence, which could lead to very unpleasant situations through which they will have little support, which interrupt career progression and which may, as Professor Southall has found to his cost, bring an end to their careers. The responses to the *Bearing Good Witness* consultation made it clear that the consultation document included nothing that would deal with this issue. The arrangements proposed, whatever the merits in terms of bureaucratic management, would not improve either the availability of expert witnesses or improve the willingness of paediatricians and other professionals to engage in child protection work. An implementation project board has been appointed to address the issues arising from the consultation. It will only be if the serious problems with the GMC are addressed and proper procedures are put in place to protect expert medical witnesses that there is any prospect of any solution to the shortage of expert witnesses.